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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-471

NATHANIEL JOHNSON, JR.,
PETITIONER,

v.

STATE OF MARYLAND,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS, STATE OF MARYLAND

F. LEE BAILEY
One Center Plaza
Boston, Massachusetts 02108
GERALD ALCH
One Center Plaza
Boston, Massachusetts 02108
WILLIAM H. MURPHY, JR.
2115 One Charles Center
Baltimore, Maryland 21201
LEROY W. CARROL
2115 One Charles Center
Baltimore, Maryland 21201

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS, STATE OF MARYLAND

The petitioner, NATHANIEL JOHNSON, JR., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Special Appeals, State of Maryland.

Opinion Below

The opinion of the Court of Special Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the Court of Appeals, State of Maryland.

Jurisdiction

The judgment of the Court of Special Appeals was filed on March 27, 1972 and Mandate issued thereon on April 3, 1972. A timely petition for certiorari was filed with the Court of Appeals, State of Maryland and said petition was denied on June 9, 1972. An application was made to Mr. Chief Justice Burger, Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit, and order dated _____ was granted herein extending petitioner's time for filing a petition for writ of certiorari to and including September 21, 1972. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

Questions Presented

1. Whether incomplete and uncorroborated information of an informant's credibility can establish probable cause for the issuance of a search warrant as required by the Fourth Amendment of the United States Constitution.

2. Whether the lapse of time between an informant's observation relied upon, and the application for a search warrant can be of such length so as to render stale the necessary element of probable cause required by the Fourth Amendment of the United States Constitution.

3. Whether a State's constitutional provision empowering juries to decide questions of both fact and law deprives an individual of due process and the equal protection of the law as required by the Fourteenth Amendment of the United States Constitution.

Constitutional Provisions Involved

Fourth Amendment, U. S. Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment, U. S. Constitution:

Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

* * * nor deny to any person within its jurisdiction the equal protection of the laws * * *

Article XV, Maryland Constitution:

Section 5. "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."

Statement of the Case

Petitioner was convicted by a jury in the Criminal Court of Baltimore on June 21, 1971 of conspiracy to violate the Controlled Dangerous Substance Law (Indictment No. 658), possession of heroin (Indictment No. 663), possession with intent to manufacture and distribute a controlled dangerous substance, heroin (Indictment No. 665) and maintaining a common nuisance (Indictment No. 664). Under the combined Indictments No. 663 and 665, the Petitioner was sentenced to a term of twenty years and was fined Twenty-Five Thousand Dollars ($25,000.00). The Petitioner was sentenced to a term of fifteen years and fined Twenty-Five Thousand Dollars ($25,000.00) under

Indictment No. 664, the sentence and fine to run consecutively to those imposed under Indictments No. 663 and 665. Under Indictment No. 658, the Petitioner was sentenced to a term of fifteen years and fined Twenty-Five Thousand Dollars ($25,000.00), the term to run concurrently with the other two imposed but the fine was imposed consecutively. The total prison sentence received by the Petitioner as a term of thirty-five years and the total fine imposed was Seventy-Five Thousand Dollars ($75,000.00).

At the trial the State introduced the application for the search and seizure warrant and the supporting affidavit. Petitioner's counsel moved to quash the warrant and the motion was denied by the trial court.

The following is an exact copy of the search warrant and affidavit:

"AFFIDAVIT

Affidavit, in support of search and seizure for the person known as Nathaniel Johnson N/M 32 aka Junior Bunk, B of I #197-996 about 5-8 to 5-10, about 175-185 lbs. medium bush hair style, and the premises which he occupies, uses, rents or keeps known and so described as a two story brick row home type dwelling known as 818 Wicklow Road, and the vehicles also used by Nathaniel Johnson aka Junior Bunk so described as: a 1969 Mercury Marquis — Green w a white top, four door sedan bearing Maryland Lic. GJ-6460, this vehicle is listed to: Shirley Johnson of 1003 N. Woodington Rd., this person is the wife of Nathaniel Johnson and is a past address of Nathaniel Johnson. And the vehicle so described as: 1969 Mercury Cougar Cpe. gold in color bearing Maryland Lic. GN-4034, this vehicle listed to a: Willie Johnson 3815 Clifton Ave., this also is a past address of Nathaniel Johnson.

Based on the attached information contained herein this affidavit your affiants believe that probable cause exist in that Nathaniel Johnson aka Junior Bunk is presently using above described premises, and the so described vehicles for the illegal manufacturing, possessing, distributing concealment and transporting of the certain controlled dangerous substances and their related paraphernalia and other tangible items and goods in violation of the law pertaining to Article 27, Sections 276 thru 302 of the Annotated Code of Maryland.

The basis for the warrant is the probable cause based on the information received from various reliable informants, so described herein, the personal knowledge of your affiants, the personal observations of your affiants and other investigative aids.

Your First Affiant, Detective William Pennington, a duly constituted member of the Baltimore City Police Department, currently assigned to The Criminal Investigation Division, Narcotic Unit.

[Page Two] Det. Pennington has been a police officer for over (8) years, successfully completed the two (2) week training class in Washington, D.C. which was sponsored by The Bureau of Narcotics and Dangerous Drugs, has attended the local training class also sponsored by that same organization, has given lectures to various social groups has worked in the area of drug enforcement for over five (5) years. Has worked in an undercover capacity on many occasions, is familiar with the methods and materials used by drug violators in their acts of manufacturing and distributing certain controlled dangerous substances and their related paraphernalia, and is also familiar with the various terminology frequently used in those transactions.

Your Second Affiant, Detective Oscar Requer, also

a duly constituted member of The Baltimore City Police Department, presently assigned to Criminal Investigation Division, Narcotic Unit, Detective Requer has been a police officer for over seven (7) years and has experience in the field of drug enforcement, has completed the three day narcotic training class, sponsored locally by The Bureau of Narcotic and Dangerous Drugs. Det. Requer is also familiar with the methods and materials used by drug violators, he has also worked in an undercover capacity and has been the arresting and or investigating officer in over fifty cases involving controlled dangerous drug violations.

During the second week of December 1970, Det. Requer received certain information from a reliable informant known to members of the Narcotic Unit, this informant has in the past given information that proved to be accurate and true, this informant has identified over 35 different photographs of individuals known to the Narcotic Unit as being actively engaged in the illicit drug traffic in Baltimore City. This same informant gave information about each concerning their activities. This information accurately corresponded with information [Page Three] that was previously given by other logally reliable informants. This same informant gave information and actively participated in certain investigations that resulted in over five arrest and seizures of certain quantities of controlled dangerous substances and their related paraphernalia during the past six months.

This same informant related to Det. Requer that he has been in the company of a person known to him as: Junior Bunk N/M 32, the informant was shown a group of photographs and from the group the informant identified the B of I photo #107-996, that being: Nathaniel Johnson N/M 32, the informant related that during

the last two days of the 3rd week of December 1970, he was in company with two other males and Junior Bunk, they were in a Mercury Cougar, Gold in color bearing Md. Lic. GN-4034, and same was being operated by Junior Bunk, the informant and the two other males were picked up at the corner of Fulton and Baker Sts. by Junior Bunk in the Mercury Cougar. The informant related that the conversation was about narcotic drugs. While in the car one of the males, who is known to members of the Narcotic Unit, whom the informant identified from B of I photographs, asked Junior Bunk "If he was going to give him his stuff today?" Junior Bunk was then in the area of Edmondson Ave. and Pulaski St. and Brice St. and he stated that he wanted to see if anyone else needed to re-up" Junior Bunk stopped the car once reaching that location and had conversation with two males at the corner of Brice and Edmondson Ave. the conversation was about re-uping. (to the informant and your affiants this terminology means to re-supply with a quantity of narcotics) Junior Bunk advised them he would see them later and that if he didn't to get in touch with Jerry or Smoke, (these persons are known to be drug violaters — Jerry Knox, the brother-in-law of the Person known as Junior Bunk-Nathaniel Johnson, recently arrested by this Unit for violations of the narcotic laws and is presently awaiting trial. And Henry "Smoke Dope" Dawson, also a known drug violator. These persons are known to be lieutenants for Nathaniel Johnson — Junior Bunk. The [Page Four] informant then stated that Junior Bunk then drove near the area of Edmondson Village and then to a street that the informant identified as Wicklow Road, Junior Bunk told the persons in the car to remain in the car and that he would be right back. The informant

observed Junior Bunk go to 818 Wicklow Road and enter with what appeared to be a key from his coat pocket as he did not knock or ring a bell. After about 5 minutes he came out and walked back to the car and once inside the car he handed to one of the males a brown paper bag, the male opened it and the informant saw that the bag contained from 5 to 8 bundles of glassine bags that contained a white powder — suspected heroin. (a bundle usually contains between 20 & 25 glassine bags) The male examined the bundles and put them back into brown paper bag and put them in his coat pocket. Junior Bunk then drove back to the area of Edmondson and Brice Sts. and said "I don't see them so I guess they'll have to see Jerry or one of the others." Junior Bunk then drove to the area of Fulton and Baker Sts. and everyone got out and Junior Bunk drove from the area.

During the second week of December 1970 Det. Requer observed the person known to him as Junior Bunk, Nathaniel Johnson, operating a 1969 Mercury 4 dr. sedan bearing Md. Lic. #GJ-6460 — Green with a white top and this vehicle is listed to: Shirley Johnson — 1008 Woodington Av. this is a past address of Nathaniel Johnson aka Junior Bunk, Det. Requer made observations of Nathaniel Johnson leaving the address of 818 Wicklow Rd. operate the Mercury Marquis Md. Lic. GJ-6460, also the Mercury Cougar Md. Lic. GN-4034 was parked in front of that location. After leaving the area he drove to the area of Edmondson Village and parked the auto, Det. Requer identified himself as a police officer and the operator identified himself as Nathaniel Johnson, and stated that he was living on Brice St. However he could not produce a valid operators permit. He advised Det. Requer that he would

leave the auto parked on the lot and have someone come and remove the vehicle later on.

[Page Five] During the second week of Dec. 70, Det. Pennington also received information from various informants that Junior Bunk was presently using 818 Wicklow Rd. as a storage place and from which to distribute controlled dangerous substances. And further received reliable information from Det. Sgt. Stephen Tabeling in that one of Sgt. Tabelings reliable informants while in company with an undercover police officer identified the address of 818 Wicklow Rd. and stated that this was the house used by Junior Bunk as he has been in the company of Junior Bunk in the house. This informant identified the B of I photo of Nathaniel Johnson, as the person known to him as Junior Bunk. Further information obtained from Det. Sgt. Arthur Westveer that the telephone number 566-2850 is in fact listed to a Mrs. Shirley E. Johnson N/F — of 818 Wicklow Rd. and this person is the wife of Nathaniel Johnson aka Junior Bunk.

During the last several months your affiant has seen Nathaniel Johnson aka Junior Bunk in the company of Jerry Knox, James Wesley Carter, Henry Dawson, Charles Elliott, Jerry Wynn. All of these persons are known to the C.I.D. Narcotic Unit as being involved in the illegal sales and distribution of controlled dangerous substances. All are in the files of the C.I.D. Narcotic Unit and have in the past been arrested for drug charges. Nathaniel Johnson has in the past (1960) been arrested for sales of heroin to police agents and received a four (4) years sentence for that violation. Det. Pennington has known this person for over a period of five years (5) and about his activities, and the C.I.D. Narcotic Unit has maintained an active file on Johnson for over 10 years and during those years

has received continuous reliable information as to his activities and places of residence.

Based on the aforegoing probable cause, your affiants believe that Nathaniel Johnson is presently using the premises of 818 Wicklow Rd. for the illegal keeping; concealing, distributing and manufacturing [Page Six] of certain controlled dangerous substances and further that the so named and described vehicles, Md. Lic. GJ-6460 Mercury Marquis and the Md. Lic. GN-4034 Mercury Cougar is being used by Nathaniel Johnson aka Junior Bunk for the illegal concealing, distributing there from and the transporting of certain controlled dangerous substances, in violation of the law. pertaining to Art. 27, Sections 276 thru 302 of The Annoted Code of Maryland.

First Affiant Det. Oscar Requer
Second Affiant Det. Wm. Pennington

Subscribed and Sworn to before me this 14 day of Jan. 1971.

Robert James Gerstung
Judge of the Municipal Court of
Baltimore City."

Reasons for Granting the Writ

I. Explication by this Court of what Information Is Necessary to Support the Credibility of an Unidentified Informant and Hence to Establish Probable Cause for the Issuance of a Search Warrant, Is Essential for the Guidance of those Judicial Officers Called Upon to Evaluate Such Information.

The Court below specifically and exclusively utilized as its predicate for concluding that the informant was credible the following language in the affidavit:

> "This same informant gave information and actively participated in certain investigations that resulted in over five arrests and seizures of certain quantities (sic) of controlled dangerous substances and their related paraphernalia during the past six months."

It is the contention of the Petitioner that the issue here is not whether the informant had, in fact, given useful and credible information in the past but rather whether within the four corner of the affidavit sufficient facts were reflected to establish the necessary credibility of the informant. Petitioner contends that such was not the case.

Before a magistrate can issue a search warrant he must have sufficient information to support an independent judgment that probable cause exists for the warrant. *Whitely* v. *Warden, Wyoming State Penitentiary,* 401 U.S. 560 (1971).

To arrive at such an independent judgment the issuing magistrate must conclude that the knowledge attributed to the informant, if true, would be sufficient to establish probable cause, that the affidavit is accurately and truthfully relating what the informant said and that the informant was accurate both in his description and perception of the alleged criminal activity. *U. S.* v. *Harris,* 403 U.S. 573 at 587. (Dissenting opinion of Justice Harlan).

This Honorable Court had, in the past, held that it is of the utmost importance that the informer be both truthful and have personal observation of alleged acts. *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *Spinelli* v. *U. S.,* 393 U.S. 410 (1969).

One must bear in mind that the affiant swears under oath but the informer does not, all the more reason to lay great stress upon the informer's credibility.

If probable cause is to be determined by the magistrate and not the affiant, then it follows that the greater the

amount of information the magistrate has about the informer, the more accurately will he be able to arrive at a determination of the existence of probable cause, or not. This would undoubtedly benefit both sides since the individual's 4th Amendment rights would be well protected and the warrants issued by magistrates would be less susceptible to attack on the issue of probable cause.

Petitioner contends that in the case at bar the magistrate was furnished with insufficient information in order to find probable cause. The affidavits said nothing about the number of times the informer had even given *inaccurate* information to the police. It did not further specify as to when "during the past six months" the informant had supplied information to the police. For all that appears, the five arrests and seizures mentioned grew out of one transaction or observation, occurring only on one day during the prior six months. No mention was made of what was actually seized, in what quantities and whether such evidence was uncovered which the informant indicated would be found. No corroborative information by the affiants with regard to informant's reliability *cum* informant appears within the four corners of the affidavit. The magistrate was without sufficient foundation to form an opinion regarding the credibility of the informer.

Surely the 4th Amendment should not be stretched to cover the issuance of warrants upon information given by unidentified persons whose credibility cannot be determined and whose names cannot be mentioned. Such a warrant, that has been conceived in ignorance, and born in secrecy, should be served in darkness.

II. Explication by this Court Regarding the Effect on Probable Cause of the Length of Time Between an Informant's Observation and the Application for a Search Warrant Is of the Utmost Importance in the Guidance of Judicial Officers.

The affidavit reflects that the relied upon informant made *but one* observation of alleged illegal activity on the part of Petitioner, on or about December 19, 1970. Application for search warrant was not made until January 14, 1971. Petitioner contends that the lapse of 26 days between the date of the alleged illegal activity observed and the date of the search warrant renders the necessary element of probable cause stale. Within the four corners of the affidavit there are no facts which rise to a reasonable inference that illegal activity was occurring at 818 Wicklow Road on a continuing basis. Regardless of the additional information regarding Petitioner's past history, the only information therein about 818 Wicklow Road is that during the third week of December, 1970, the Petitioner was seen entering said residence with a key and that five minutes later he exited with a brown paper bag containing 5 to 8 bundles of glassine bags that contained a white powder — suspected heroin. There was no information that the powder was, in fact, heroin. There was no information that this alleged illegal activity was anything more than an isolated incident. No information was given to who lived in said premises or that Petitioner had, in fact, ever visited said premises prior to or after the observation made during the third week of December, 1970.

The Court below cited *Clayton* v. *State,* 1 Md. App. 500, to support its position that probable cause existed on January 14, 1971. In *Clayton* v. *State, supra,* observation establishing the facts set forth in the application for the warrant were made during a period of 19 days to 12 days from the making of the affidavit and the issuance of the warrant. However, Judge Orth, speaking for the Court, said, *inter alia, "During this period the observation on the second and third day confirmed that the observations on the first day were not an isolated instance but part of the continuing plan and practice."* 1 Md. App. at 504 (Emphasis added).

The language emphasized indicates that the "hinge" in the Court's decision that probable cause existed, was the confirmatory observations on the second and third day.

Clayton, supra, can be distinguished from the case at bar since in the latter there was no information tending to show a continuing plan and practice.

Clayton, supra, appears to be the only Maryland case in point but several other jurisdictions have confronted this issue. A lapse of 25 days was held not to vitiate probable cause since the affidavit included an account of extended observations in a case involving gambling activities. *U. S.* v. *Long,* 169 F. Supp. 730 (D.D.C. 1959). *State* v. *Cooper,* 154 A. 423 (N.J. 1931).

Several jurisdictions have held that a delay in excess of 25 days poses too great a risk to the accused that the situation at the locus to be searched had changed during the interim. *State* v. *Gardner,* 240 P. 984 (1925), *U. S.* v. *Bosch,* 209 F. Supp. 15 (D.C. Mich. 1962), *Dandrea* v. *U. S.,* 7 F.2d 861 (8th C. C.A. 1925).

Ingram v. *State of Oregon,* 445 P. 2d 503 (1968) was a case with a fact situation very similar to the case at bar. There a defendant was convicted of possession of heroin with the affidavit in support of the search warrant being executed after a lapse of 28 days after the only observation made. The Court found lack of probable cause because the length of time that had elapsed between the obtaining of heroin (a sale was made) and the making of the affidavit was too great to permit the magistrate to find that probable cause existed that narcotics were on the premises on the date of the affidavit.

In *U. S.* v. *Allen,* 147 F. Supp. 955 (D.C.F.D. Kentucky 1957), Chief Judge Ford quoted from page 1414 of 162 A.L.R. 1406-1418, to the extent that an interval of not

more than 20 days had never been held so unreasonable as to vitiate a search warrant, whereas an interval of 30 days had always been held to be an unreasonably long delay. Therefore, the doubtful time zone was, roughly speaking, the fourth week from the alleged offense.

There must, therefore, be some period of time whereby the probable cause established by an isolated act on a premise becomes stale. The only determination to be made by the Honorable Court is whether the lapse of time in the case at bar vitiates probable cause. Petitioner submits that the test must be one of "continuing activity" as supported by the cases cited. There can be no magic formula or specified lapse of time to identify "staleness". Rather the concept of a "continuing activity or plan" becomes a dynamic rule which can be applied irrespective of the actual number of days involved.

Petitioner submits that a second argument can be made by analogy to Article 27 Section 551 of the Annotated Code of Maryland which provides that, ". . . Any search or seizure under the authority of such search warrant shall be made within fifteen (15) calendar days from the date of the issuance thereof and after the expiration of said fifteen (15) day period, said warrant shall be null and void . . .".

Petitioner contends that the fifteen (15) day period should also govern any lapse between the time of the observation of the alleged illegal act and the issuance of the search warrant. In support of this position, Petitioner cites *Sgro* v. *U. S.*, 287 U.S. 206, where, in a concurring opinion, Mr. Justice McReynolds stated that since the applicable statute declared that after ten days a warrant not fully executed shall be void, no search warrant should issue upon an affidavit more than ten days old.

III. ARTICLE XV SECTION 5 OF THE MARYLAND CONSTITUTION DEPRIVES THE RESIDENTS OF THAT STATE OF THE EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Trial Court instructed the jury as follows:

> "Under the Maryland Constitution and Statutes the jury in a criminal case is the final judge, and the only judge, of both the facts and the law. I advise you as to what I believe is the applicable Maryland law, but as I have said, under our Constitution and Statutes, you have a right to disagree with my interpretation of the law."

The jury was subsequently instructed on various principles of law regarding the definition of reasonable doubt, the prohibition against inferring guilt from defendant's not taking the stand and so forth. However, under the above quoted instruction the jury was free to disregard these instructions and arrive at their own definition of these fundamental principles of law, all to the Petitioner's prejudice.

The trial judge was acting in accordance with the provisions of Article XV Section 5 of the Maryland Constitution which provides:

> "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."

At the outset, Petitioner concedes that the Constitutional issue here presented has been raised before this Honorable Court on several occasions, *Wyley* v. *Warden, Maryland*

Penitentiary; 372 F.2d 742, cert. den. 389 U.S. 863, reh. den. 389 U.S. 997; as well as *Brady* v. *State of Maryland*, 373 U.S. 83, in connection with a collateral matter. In *Giles* v. *Maryland*, 372 U.S. 767, an appeal was dismissed which raised this issue along with others, for want of a substantial federal question.

However, the Court in *Brady* considered this issue only by way of deciding the main issue on appeal. Mr. Justice Douglas commented that this provision of the Maryland Constitution making the jury in criminal cases "the Judges of Law does not mean precisely what it seems to say", 373 U.S. at 89. He then noted the limitations added by state statute in judicial construction.

The rule embodied in Aricle XV Section 5 exists in only two jurisdictions: Maryland and Indiana. Indiana has largely eliminated the dangers flowing from such a rule by holding that the trial court, "is not required to neutralize the effect of its instructions by telling the jury that they are at liberty to disregard them and to decide the law for themselves." *Bridgewater* v. *State*, 153 Ind. 560, 566; 55 N.E. 737, 739 (1889).

In federal criminal prosecutions this Honorable Court held as early as 1895 that juries are the judges of the facts, under binding instructions by the judges on questions of law. *Sparf and Hansen* v. *United States*, 156 U.S. 51.

Several Maryland jurists have advocated repeal or modification of Article XV Section 5. Chief Judge Stedman Prescott declared it to be, "archaic, outmoded, and atrocious." *Prescott, Juries as Judges of the Law: Should the Practice be Continued?* 60 Md. S.B.A. 246, 247 (1955), Chief Judge William L. Henderson referred to it as, "our unique and indefensible procedure." *Henderson, The Jury as Judges of Law and Fact in Maryland.* 52 Md. S.B.A. 184, 199 (1947). See also *Dennis, Maryland's Antique Constitutional Thorn*, 92 U. of Pa. L. Rev. 34 (1943).

Petitioner contends that Article XV Section 5 empowering the jury, as it does, to decide principles of law regarding the definition of reasonable doubt and to draw inferences of guilt from his right to remain silent and not testify at his trial operates so as to deny him due process or violates the Equal Protection Clause of Fourteenth Amendment.

Petitioner concedes that he did not object to the Trial Court's instruction at the time of trial. However, he is not banned from raising the federal constitutionality of Article XV Section 5, Maryland Constitution, by such failure. *Wyley* v. *Warden, Maryland Penitentiary, supra.* Furthermore, under the law as it existed, it would not have availed him to do so. *Slansky* v. *State,* 192 Md. 94, 63 A.2d 599; *O'Connor* v. *Ohio,* 385 U.S. 82 (1966).

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Special Appeals of Maryland.

Respectfully submitted,

F. Lee Bailey
One Center Plaza
Boston, Massachusetts 02108
Gerald Alch
One Center Plaza
Boston, Massachusetts 02108
William H. Murphy, Jr.
2115 One Charles Center
Baltimore, Maryland 21201
Leroy W. Carrol
2115 One Charles Center
Baltimore, Maryland 21201
Attorneys for the Petitioner

APPENDIX

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 536
September Term, 1971

NATHANIEL JOHNSON, JR.
v.
STATE OF MARYLAND

ANDERSON
MORTON
CARTER,
JJ.

Opinion by Anderson, J.

Filed: March 22, 1972

The appellant, Nathaniel Johnson, Jr., was convicted by a jury in the Criminal Court of Baltimore, Judge Charles D. Harris presiding, of conspiracy to violate the Controlled Dangerous Substance Law (Indictment #658), possession of heroin (Indictment #663), possession with intent to manufacture and distribute a controlled dangerous substance, heroin, (Indictment #665), and maintaining a common nuisance (Indictment #664). Under the combined Indictments #663 and #665, the appellant was sentenced to a term of twenty (20) years and was fined $25,000.00. The appellant was sentenced to a term of fifteen (15) years and fined $25,000.00 under Indictment #664, the sentence and fine to run consecutively to those imposed under Indictments #663 and #665. Under Indictment

#658, the appellant was sentenced to a term of fifteen (15) years and fined $25,000.00, the term to run concurrently with the other two imposed but the fine was imposed consecutively. The total prison sentence received by the appellant was a term of thirty-five (35) years and the total fine imposed was $75,000.00.

On appeal the appellant contends that the trial court erred in denying his motion to quash the search warrant. The appellant makes a two-pronged attack on the warrant. He argues that the affidavit in support of the warrant was insufficient to establish probable cause. Secondly, the appellant argues that the time stated in the affidavit for the warrant of the observation of the offense and the time when the warrant was issued was so remote as to render the probable cause stale, thereby invalidating the search warrant.

On January 15, 1971, at approximately 7:00 p.m., the police, armed with a search warrant issued the previous day, entered 818 Wicklow Road in Baltimore, searched the premises and found heroin. The appellant, who was present at the time, was arrested and indicted.

I

THE AFFIDAVIT AND PROBABLE CAUSE

The appellant argues that the affidavit in support of the warrant was insufficient to establish probable cause.

Judge Orth, speaking for this Court, in *Moore* v. *State*, 13 Md. App. 711, succinctly set forth the rules governing probable cause for the issuance of a search warrant at 713-716:

> "The rules governing probable cause for the issuance of a search and seizure warrant need not be complex, intricate or perplexing. We said in *Buckner* v. *State*, 11 Md. App. 55, 61-62:
>
> 'A judge may issue a search warrant when it is made to appear to him by a written applica-

tion signed and sworn to by the applicant, accompanied by an affidavit containing facts within the personal knowledge of the affiant, that there is probable cause to believe that a crime is being committed by any individual or in a building within his territorial jurisdiction, and that evidence of the crime is upon the person or within the place to be searched. * * * Probable cause is less than certainty or demonstration but more than suspicion or possibility. It is to be determined by the judge to whom application for the warrant is made. If a prudent and cautious man would be justified from the facts presented in the affidavit in believing that the offense has been or is being committed, the warrant properly may be issued. In determining the existence *vel non* of probable cause, the judge may give consideration to the special significance which objects, happenings, and individuals may have conveyed to a trained, experienced and knowledgeable police officer making the affidavit accompanying the warrant. * * * And the affidavit may be based on hearsay information, even from an unidentified informant, and need not reflect the direct personal observations of the affiant, but it must contain some of the underlying circumstances from which the affiant could be reasonably justified in a belief that the hearsay information was reliable or the informant was credible. * * *

'When a search warrant is challenged, the lower court, and the appellate court when the determination of the lower court is before it on appeal, must look for probable cause only in the affidavit itself and may not go outside it. * * *

> However the affidavit should be interpreted in a common-sense and not a hypertechnical manner, and the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded to warrants. *Frey* v. *State*, 3 Md. App. 38, 45-46, summarizing the observations in *United States* v. *Ventresca*, 380 U.S. 102. But • • • this is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists.' (citations omitted)
>
> "Thus probable cause may be shown in the affidavit by a statement by the affiant 1) of his direct observations, or 2) of information furnished the affiant by someone else, named or unnamed, or 3) of a combination of the direct observations of the affiant and hearsay information furnished him. In each instance the issuing judge must have before him enough circumstances to enable him to determine the trustworthiness of the information, for he must not only evaluate the adequacy to show probable cause of the facts and circumstances set out in the affidavit but he must also evaluate the truthfulness of the source of the information comprising those facts and circumstances. Due to the infinite variety of human conduct, the sufficiency of any affidavit must necessarily depend upon the particular facts and circumstances in it contained." [Footnotes omitted].

We note that *Moore* v. *State*, *supra*, paid due homage to the most important Supreme Court cases dealing with the rules governing a search and seizure warrant, *i.e.*, *Aguilar* v. *Texas*, 378 U.S. 108, 84 S. Ct. 1509; *Spinelli* v. *United States*, 393 U.S. 410, 89 S. Ct. 584, and the recent case of *United States* v. *Harris*, 403 U.S. 573, 91 S. Ct.

2075, which somewhat limited the application of *Spinelli* v. *United States, supra.*

In reviewing the five page affidavit in the instant case we must note that there are many instances in which statements made by the affiants are merely conclusory. A number of different informants are relied on by the affiants and in the case of all but one of these informants the affiants make no showing of their reliability other than bald statements that the informants are reliable. However, a warrant which is inadequate in one regard is salvagable in another. *Dawson* v. *State,* 14 Md. App. 18, concurring opinion by Moylan, J., at 24. In the instant case we feel that the following passage from the affidavit was sufficient to establish probable cause:

> "During the second week of December 1970, Det. Requer received certain information from a reliable informant known to members of the Narcotic Unit, this informant has in the past given information that proved to be accurate and true, this informant has identified over 35 differnt [sic] photographs of individuals known to the Narcotic unit as being actively engaged in the illicit drug traffic in Baltimore City. This same informant gave information about each concerning their activities. This information accurately corresponded with information [Page Three] that was previously given by other logally [sic] reliable informants. This same informant gave information and actively participated in certain investigations that resulted in over five arrest and seizures of certain quanities [sic] of controlled dangerous substances and their related paraphernalia during the past six months.
>
> "This same informant related to Det. Requer that he has been in the company of a person known to him as: Junior Bunk N/M 32, the informant was

shown a group of photographs and from the group the informant identified the B of I photo #107,996, that being: Nathaniel Johnson N/M 32, the informant related that during the last two days of the 3rd week of December 1970, he was in company with two other males and Junior Bunk, they were in a Mercury Cougar, Gold in color bearing Md. Lic. GN-4034, and same was being operated by Junior Bunk, the informant and the two other males were picked up at the corner of Fulton and Baker Sts. by Junior Bunk in the Mercury Cougar. The informant related that the conversation was about narcotic drugs. While in the car one of the males, who is known to members of the narcotic Unit, whom the informant identified from B of I photographs, asked Junior Bunk 'If ho [sic] was going to give him his stuff today?' Junior Bunk was then in the area of Edmondson Ave. and Pulaski St. and Brice St. and he stated that he wanted to see if anyone else needed to re-up' [sic] Junior Bunk stopped the car once reaching that location and had conversation with two males at the corner of Brice and Edmondson Ave. the conversation was about re-uping. (to the informant and your affiants this terminology means to re-supply with a quanity [sic] of narcotics) Junior Bunk advised them he would see them later and that if he didn't to get in touch with Jerry or Smoke, (these persons are known to be drug violators — Jerry Knox, the brother-in-law of the Person known as Junior Bunk-Nathaniel Johnson, recently arrested by this Unit for violations of the narcotic laws and is presently awaiting trial. And Henry 'Smoke Dope' Dawson, also a known drug violator. [sic] These persons are known to be lieutenants for Nathaniel Johnson — Junior Bunk. The [Page Four] informant then stated that Junior Bunk

then drove near the area of Edmondson Village and then to a street that the informant identified as Wicklow Road, Junior Bunk told the persons in the car to remain in the car and thet [sic] he would be right back. The informant observed Junior Bunk go to 818 Wicklow Road and enter with what appeared to be a key from his coat pocket as he did not knock or ring a bell. After about 5 minutes he came out and walked back to the car and once inside the car he handed to one of the males a brown paper bag, the male opened it and the informant saw that the bag contained from 5 to 8 bundles of glassine bags that contained a white powder — suspected heroin. (a bundle usually contains between 20 & 25 glassine bags) The male examined the bundles and put them back into brown paper bag and put them in his coat pocket. Junior Bunk then drove back to the area of Edmondson and Brice Sts. and said 'I don't see them so I guess they'll have to see Jerry or one of the others.' Junior Bunk then drove to the area of Fulton and Baker Sts. and everyone got out and Junior Bunk drove from the area."

Following the aplicable guidelines, we feel that the last sentence of the first quoted paragraph in the affidavit, which related that the informant had given information and actively participated in investigations resulting in over five narcotic arrests and seizures within the preceding six months, was adequate for the issuing magistrate to conclude that the informant was credible. *Frankis* v. *State*, 11 Md. App. 534, 538. We feel further that the rest of the above quoted passage sets forth sufficient facts and circumstances so that the issuing magistrate would be justified from the facts presented in the affidavit in believing that the offense has been or is being committed. The second paragraph sets forth observations by an informant

who, as has been stated, could have been considered credible by the issuing magistrate. These observations, if true, constitute probable cause to believe that the narcotics laws were being violated by the appellant at 818 Wicklow Road.

The appellant contends, however, that even the quoted portion of the affidavit is insufficient because the sequence of time as to when the informant relayed his observations to Detective Requer is unclear. We disagree. It is true that the first paragraph of the quoted passage relates that the informant first gave information to Detective Requer during the second week in December, 1970, and that no other date is given for the passing of information between the informant and Detective Requer. Taken literally this would seem to indicate that the informant gave Detective Requer information about events which occurred on the last two days of the third week in December, 1970, during the second week in December, 1970. This, of course, is an impossibility and we do not think the magistrate was required to read the affidavit in this manner. As stated, the affidavit should be interpreted in a common-sense and not a hypertechnical manner, and the resolution of doubtful or marginal cases should be largely determined by the preference accorded to warrants. *United States* v. *Ventresca, supra; Henderson* v. *State,* 243 Md. 342, 347; *Frey* v. *State, supra.* Further the general rule is that when an error appears in the affidavit concerning the date of the observation such error will not vitiate an affidavit. Varon, *Searches, Seizure and Immunities,* Sec. 13, at 324. In the instant case, a common-sense interpretation of the affidavit could only have led to the conclusion by the issuing magistrate that there necessarily had to have been some communication between the informant and Detective Requer after the second week in December, 1970. In fact, this communication could only have taken place at some time after the last two days of the third week in December, 1970.

II

The Issue of Stale Probable Cause

The appellant contends further that the warrant was a stale warrant in that the issuance of the warrant occurred at a time which was too remote from the observation of the offense. The observations occurred on the 18th and 19th of December, 1970, and the affidavit was made and issued on January 14, 1971. There is no statute in this State providing that the facts in the application, set forth to establish probable cause, must result from observations made within a designated time before the issuance of the warrant. Nor do we find any cases which lay down a rigid rule. However, the remoteness of the facts observed from the date of the issuance of the warrant is an element to be considered in each instance by the issuing authority in determining whether it appears that there was probable cause. *Clayton* v. *State,* 1 Md. App. 500, 503. The issue, therefore, is whether this lapse of 26 days between the observation of the facts and the issuance of the warrant, was so remote, *when considered in the circumstances of this case,* so as to invalidate the search warrant. *Clayton* v. *State, supra,* at 504. See Varon, *supra,* at 322; 100 A.L.R. 2d 525.

In *Clayton* v. *State, supra,* the observations establishing the facts set forth in the application were made during a period of 19 days to 12 days from the making of the affidavit and the issuance of the search warrant. Three observations were made and the Court in *Clayton* v. *State, supra,* at 504, was of the opinion that the second and third observations confirmed that the observations on the first day were not an isolated instance but part of a continuing plan and practice. The Court considered this continuing plan and practice an important fact in holding that the lapse of 19 days to 12 days was not so remote as to render the warrant invalid. *Clayton* v. *State, supra,* at 504.

It is true that in the instant case that there were only two valid observations in the affidavit and that the lapse was one of 26 days. However, in the instant case the affidavit asserts that the informant was present when the appellant was making his rounds to determine who was to be re-supplied with narcotics. It was at this point that the appelalnt returned to 818 Wicklow Road and brought back five to eight bundles of glassine bags containing the suspected heroin. The activity of the appellant when the informant was in the appellant's car seemed to suggest a continuing business in the distribution of narcotics. We feel, therefore, that under the facts and circumstances of this case, the facts observed were not so remote from the issuance of the warrant to invalidate the warrant for lack of probable cause. *Clayton* v. *State, supra,* at 504. In this regard it is important to remember what we have stated above and what the Court of Appeals said in *Henderson* v. *State, supra,* when the Court at 347 quoted *United States* v. *Ventresca, supra*:

> • • • when a magistrate has found probable cause the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

We find no error in the denial of the motion to quash the warrant.

JUDGMENTS AFFIRMED;
APPELLANT TO PAY COSTS.